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International Academy of Commercial and Consumer Law: Joint Ventures in South American Integration

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I. Integration in South America

A. Introduction

In 1995, the *Saint Louis University Law Journal*[1] published our first approach to business organizations in the Mercosur on the basis of our work for the Seventh International Conference of the Academy of Commercial and Consumer Law. Mercosur today is composed of four member countries (Argentina, Brazil, Paraguay and Uruguay) and two associate countries (Bolivia, Chile). It has signed treaties with the Community of Andean Countries (hereinafter referred to by its Spanish acronym "CAN") made up of Venezuela, Colombia, Peru, Ecuador and Bolivia, and with the European Union. Mercosur also forms part of the "ALCA," a project advancing the creation of a free trade zone throughout America.

This is in addition to a wide number of bilateral agreements and some other regional or inter-regional treaties that form the complex map of the integration process development in South America. In this region, integration is not a linear, chronological process, but a manifold, flexible, and sometimes asymptotic economic, political and cultural movement. In spite of this, first-world countries fail to pay the region the attention that is necessary in view of its expansion potential.

Integration in Latin America commenced with a general treaty known as "ALALC"[2] (1960), later replaced by the "ALADI"[3] Treaty

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1. Raúl Aníbal Etcheverry, *The Mercosur: Business Enterprise Organization and Joint Ventures*, 39 St. Louis U. L.J. 979 (1995).

2. Spanish acronym for *"Asociación Latinoamericana de Libre Comercio,"* Latin

(1980), which stands to date as the reference framework for eleven Latin countries, including Mexico. In South America, besides the Community of Andean Nations ("CAN") resulting from the Cartagena Pact, of 1983, Brazil and Argentina have signed and developed a number of Cooperation Protocols in various branches of their industry and trade, all of which gives rise to the Mercosur, laid down under the Asunción Treaty in 1991. The last integration, which began in the mid-1980s in South America, gained a significant momentum by the mid-1990s, but reached its low point by early 1999, with the unilateral devaluation of the Brazilian currency.

Da Motta Veiga[4] says that, in 1995, Brazil contributed approximately seventy percent of the total internal gross product of the Mercosur. But in that year, according to this Brazilian specialist,[5] our major partner changed its bargaining position in the Mercosur in a significant manner, "thus reflecting directly the partial reversion of the liberal trend of its industrial and foreign trade policy." This, as viewed by Da Motta Veiga, is due to several facts: (1) Brazil had to assimilate a triple-change towards the liberalization of its economy: a unilateral process of opening of the economy, an end to the Mercosur transition period with the implementation of commitments undertaken in the Uruguay Round of the GATT, and the creation of the WTO. (2) The 1994 Mexican crisis gave rise to a process of management of imports, especially through tariffs, in order to avoid a deeper deterioration of the trade balance. (3) Brazilian industry began to experience a higher exposure vis-à-vis foreign competition. (4) Industrial and foreign trade policies headed gradually in a new direction, due to the "Real" Plan and to the stabilization that was progressively achieved, an example of which was the new investment incentive instruments, whose foremost exponent was the automobile industry. The effects of these events were exacerbated by the organization of Brazil as a federal country with strong state policies.

In "contrast with the liberal industrial and foreign trade policies of the previous years" that made the Mercosur develop, the "current Brazilian neoactivism tends to place this country at a relative distance from its sub-regional commitments and from the consolidation of the customs union, although the Brazilian authorities continue highlighting the significance of these agreements."[6] These, among others, seem to be the expla-

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American Free Trade Agreement.

3. Spanish acronym for *"Asociación Latinoamericana de Integración,"* Latin American Integration Association.

4. Pedro Da Motta Veiga, *Brazil in Mercosur: Reciprocal Influence, in* MERCOSUR: REGIONAL INTEGRATION, WORLD MARKETS 25 (Riordan Roett ed., 1999).

5. *See id.*

6. *See id.*

nations of Brazil's current reluctance to deepen the "Mercosur preference," as featured by Da Motta Veiga. In this way, Brazil, with the forced opening of its economy intended to attract investments, regulates its domestic areas of services, government procurement, investment, intellectual property laws and competition policies in a manner favorable to those purposes and to negotiate these topics in bilateral or multilateral forums.[7]

As to the Mercosur as a present reality, Karl Jaspers' sentence applies: "There is no permanent real structure. The truth is evidenced in time." After five centuries of common history and of rivalries, Brazil and Argentina decide to unite gradually, in an economic region, striving to conform a common market. The Mercosur comprises two large countries that play the essential roles due to their economic potential. It will surely be of interest to observe a comparative graph of both countries the figures of which refer to the year 1999.

It should be kept in mind that the decision to build the Mercosur was made amidst very difficult reforms that, in a few years, were repeated in other countries of South America. First Chile, then Bolivia, then Argentina and finally Brazil, all confronted several challenges almost simultaneously: (1) consolidation of a rising democratic process, (2) struggle against inflation and fiscal imbalance, (3) reform of the state, (4) privatization of state enterprises, (5) opening to and participation in international trade, and (6) regional integration. Amid all these changes, which deeply altered the countries and entailed huge social costs (growth of poverty in certain sectors, growing unemployment, economic recession), steps are consistently taken towards the creation of a new region in South America. Such a movement has not been witnessed before because the countries of the area, since before independence, have engaged in confrontation, occasionally bloody.

This is not new; the world has seen the development of a geopolitical tendency of substitution of the nation-state for the region-state. Globalization is part of the transition of the nation-state declining concept. Control over currency, credit and fiscal policy were the three mainstays referred to by Jean Bodin to define the term "sovereignty" in connection with reality. It is not difficult to see that globalization has accompanied the decline of the nation-states' sovereignties and, as Peter Drucker points out, since "globalization" was first spoken about thirty-five years ago, the decline of the nation-state was highly predictable.[8]

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7. Pedro Da Motta Veiga & Joao Bosco Machado, *A ALCA e a Estratégia Negociadora Brasileira*, *in* 51 REVISTA BRASILEIRA DE COMÉRCIO EXTERIOR 33-42 (Fundacão Centro de Estudos do Comércio Exterior, Rio de Janeiro ed., 1997).

8. Peter F. Drucker, *The Global Economy and the Nation-State*, 76 Foreign Aff. 159 (1997).

In an extensive region of South America, four countries, Argentina, Brazil, Paraguay, and Uruguay—two big and two small—created an economic area with the intention of reaching a common market. The Mercosur countries developed integration by means of a governing group of bodies, which were created through the Asunción Treaty (1991) and which were perfected with the execution of Ouro Preto Protocol (1994): Council, Group, Commission of Trade, Combined Parliamentary Commission, Economic and Social Forum and Administrative Secretariat. In the last, the international legal personality of the Mercosur is acknowledged[9] and a pro-tempore chairmanship, which rotates every six months, is established among the four countries, called "Members States" under the Treaty. Nevertheless, the three bodies vested with decisive power, Council, Group and Commission of Trade, cannot make valid decisions for the region without the presence of all others in each discussion (a strict quorum) and without the consent of the four Member States. This system, as opposed to that of the European Union, is intergovernmental, since the Mercosur countries have not acknowledged a supranational entity, at least for the time being.

The Mercosur structural system is made up by the Asunción Treaty, in turn embraced within the ALADI, and various protocols that organize its institutions and regulate certain matters. The bodies vested with decision power—Council, Group and Commission of Trade—enact secondary rules of law that constitute the Mercosur legal system. The Mercosur rules are established by section 41 of the Ouro Preto Protocol.

It is in this second half of the year 2000, to which the Mercosur arrives with the success of having a single internal tariff without resolution of its removal (we refer to sugar, a rather complex item between Argentina and Brazil), and when there are many things to be addressed beyond the unilateral reduction of the exchange rate determined by Brazil at the beginning of 1999, that we are in the presence of upcoming decisions for "re-launching" the Mercosur in order to give it a new thrust and allow it to progress. These decisions strive to find a way to solve the problems in the Mercosur and to outline future plans in the development of the consolidation and enlargement of the Mercosur. These problems include: (1) internal tariffs for sugar, (2) production of automobiles and import thereof (in process of agreement, already achieved between Brazil and Argentina), (3) footwear, and (4) macroeconomic coordination and migration of companies to Brazil.

To address these problems, several steps are planned: (1) to promote trade further, (2) to encourage foreign investments, (3) to create a Mer-

9. Protocol of Ouro Preto, Dec. 17, 1994, Arg.-Braz.-Para.-Uru., art. 34, 34 I.L.M. 1244.

cosur Development Bank, (4) to develop an infrastructure for physical integration, (5) to integrate energy such as electricity, gas and petroleum, and (6) to incorporate Chile as a full partner.

B. *The Complex Order of International Business*

International commercial law has inherited the historical characterization of domestic commercial law,[10] which does not hinder attempts to frame it within a systematic category. Law is not, like some authors say, a logical product, but its understanding and intellectual discipline makes the formation of a system unavoidable. These authors propose to focus the analysis of international trade law upon three essential "moments": determination of the foundations of this discipline as a special law, elaboration of a system of the materials created to a large extent through autonomous production in commercial trade (unitary categories would emerge from same), and scientific autonomy of international trade law in relation to the other branches of private law.[11] All of these aspects contribute to legitimize socially this area of law and to aid its scientific systematization.

The progress of sciences and the advance of technology should be a historical stage serving humanity's liberation; we do not refer to material liberation, but to the fact of being able to offer the conditions of a new life in the spirit. Anti-mechanization has been a myth destroyed by Mounier.[12] It was a bourgeois myth, from which Marxism also took advantage. Machines and technology are elements to be used and represent only a means that God has allowed to humanity.

The multiplicity of legal systems in the field of international business has resulted in a complex international system. As it is known, civil law develops in the law of business, national or international, from the essential core of the contract. The contract is a legal device which constitutes the basis of the Roman law system, so much that Unidroit has created a series of principles for international contracts, the *lex mercatoria*. In Europe, there is a movement to create a common order with respect to contracts as well as some other projects under development.

Contracts can be unilateral or bilateral or can be intended to create some form of business organization, as is the case of the so-called plurilateral contracts. Bilateral contracts are the old agreements among companies, to develop business. An example of this is the traditional pur-

10. LUIS FERNÁNDEZ DE LA GÁNDARA & ALFONSO-LUIS CALVO CARAVACA, DERECHO MERCANTIL INTERNACIONAL 104 (2d ed. 1995).

11. *Id.* at 106.

12. "La machine en accusation." CANDIDE MOIX, EL PENSAMIENTO DE EMMANUEL MOURNIER 329 (Estela, Barcelona 1964) (1960).

chase and sale of goods, which, since 1980, has been codified as substantive law in the Vienna Convention, an international statute with many adhesions and that is used by businessmen worldwide. Among plurilateral contracts, closed ones form associative organizations surrounded by imperative rules, with the result that a substantial portion of their provisions cannot be altered by the will of the parties. The organizational contracts featuring more international vocation are those related to companies and, among them, the commercial ones, a subcategory acknowledged in all the Roman law legal systems.

C. Ideas on the New Commercial Law

Nineteenth century commercial law of the acts of commerce, which was of French origin, no longer has any practical validity. Even the sources they relied upon have changed,[13] since a new universe of technology has opened. The rise of electronic commerce will displace the way of living and buying in the future. The business-consumer relationship will change. Some (Peter Drucker) assert that the traditional multinational enterprises will be defeated by e-commerce, and that victory will take place in the fields of the distribution of the goods, service, repair, maintenance and delivery.

Electronic commerce, not yet regulated in our country, has done away with distances. The client no longer cares where the on-line seller is. The businessman is neither concerned about the place from where his products or services are ordered. But the operation of shipment and delivery on time, correct and accurate, become essential. The company having the best delivery organization will be the one to attain success in the market, even without having an office in that market and even though it may not be the producer of the service or item. This is an example of how the trade of the next century will be. For this reason, new legal problems will need new solutions to attain the desired legal certainty. A great distance runs between speculation and practice. There is also a large distance between theories and legal rules, even though the striven-for reality is clear.

In approaching the task of drafting advanced rules for the Commercial Code of Bolivia,[14] our basis was that we should suppress the listing of acts of commerce because the system was obsolete as well as impractical. The whole Commission agreed. But laying that down in legal drafting turned out to be quite a different thing. We lacked the

13. *See* Raúl Aníbal Etcheverry, *El Derecho Comercia: Nuevas Fuentes*. 1992 LA LEY 1132.

14. The author has been working, since 1998, on the reform of the above-mentioned Commercial Code as an international consultant.

guide—the axis—of the Code. Then we thought of the enterprise and the entrepreneur, which are the modern concepts of commercial law and business.

A new query appeared: should we define the enterprise, and, if so, how? It immediately seemed clear that the entrepreneur phenomenon does not only belong to the realm of commercial law, neither it finds its limit extending us unto civil law. Enterprise is a much richer sociological concept. We will neither repeat our investigations, nor those of others, on the enterprise; books and books, pages and pages have been written on the subject. But a legal systemic conception has not been achieved. In our opinion, this has not been accomplished in any place of the world.

The issue then becomes determining how "mercantile matter" is to be found. There could not be a Commercial Code without a reference to the regulated matter, this is, the tacit legal explanation of the reason for having a special law. The notion of management for profit was not sufficient, because it does not necessarily occur in commercial matters while it does in the case of associations or foundations. It is clear that the difference is in the allocation of profit among the associates; however, the management of all collective institutions seek profit, although with a different degree of intensity corresponding to the corporate purpose. It is clear that the transactions or the contracts entered into by enterprises can be of civil or commercial nature, but what is the distinction between them?

II. Structure of Business in the Mercosur

A. Business Companies

Companies known in the civil law and the structure of the two types of companies, the stock corporation ("*sociedad anónima*") and the limited liability company ("*sociedad de responsabilidad limitada*"), represent a pattern repeated in all Roman law countries and especially in the codes of Europe and of Latin America. It does not seem necessary in the Mercosur to unify company structures. Moreover, in some countries, some types of companies are more prevalent and are more developed (for example, in Argentina the stock corporation is more frequently used, while in Brazil this is so with regards the limited liability company).

A greater harmonization should actually be required, for the sake of protecting businessmen who more frequently are carrying out transactions in the new region. The largest harmonization in the Mercosur legislations is achieved by an extra-Mercosur convention, that is the Interamerican Convention on conflicts of laws regarding business

companies, created in the second meeting of CIDIP (American meetings for the unification and development of private international law). The following countries have agreed to be bound by the Convention: Peru (1980), Uruguay (1980), Mexico (1983), Guatemala (1984), Paraguay (1985), Venezuela (1985), Argentina (1988), and Brazil (1995). Although the Convention is not a fully substantive law rule, we cannot regard it as a pure conflict of law rule, comprised within a second generation of private international law rules that announce the development of more substantive norms of international law.

The Interamerican Convention has several achievements, but in our opinion, its rules contain a fundamental provision: the direct recognition of the companies created in the signatory countries as legal persons. The (legal) existence, capacity, operation and dissolution of business companies are governed by the law of the place of incorporation. This place is where the procedural and substantive requirements are completed for the creation of these companies.

The law that governs the performance of the acts comprised within their corporate purpose is that of the state where the same shall be carried out. The same principle applies to controlling companies. The competent judges to hear in all matters originating in the direct or indirect performance of acts comprised within their corporate purpose are those of the state in which these acts are carried out. It is possible that a company changes the actual seat of its administration, in which case, the receiving state may require same to comply with the rules of its new seat. The application of the Convention is limited only by the existence of issues affecting a state's public policy.

B. Business Concentration and Decentralization

Enterprises act in a market, which is a geographical, economic and social space, governed by an unitary legal system in which the law operates at two levels: commercial law, that relates to the organization and the development of business, and economic law, concerned with the organization of each country or of each region. Enterprises and economic groups fight to enter a market and then to stay within it. That struggle takes place in the key legal issues of economic law, arising from a market economy.

In Professor Reich's vision, three vertexes exist in the market: economy direction, as determined by the government of a state, competition and consumer' protection law. For Professor Rippe, from Uruguay, the terms that govern a market are intellectual rights, consumer protection and competition law. We propose a viewpoint made up by both proposals: (1) law related to the direction of the economy; (2) competi-

tion law and related legislation (i.e., loyal trade practices); (3) consumer protection; and (4) certainty in intellectual rights.

Enterprises are integrated horizontally when they are competitors, when they produce the same. The so-called vertical integration takes place when it embraces the productive process. A conglomerate means a group concentrated under a single management, with diverse companies that engage in economically different and independent activities.

The concentration forms include:

1. Management agreements, of which there are some variants and which exist when one enterprise transfers all or part of its management to another.
2. Dominance clauses, which are of a contractual nature and set forth the influence and power of one enterprise over another.
3. Related or integrated agreements, which are variations of relationships which can be established among companies and impose limitations on the decision power of one of them.
4. Purchase of a control stock package, which is a form of acquiring the legal and economic will of a company by another but which will not always entail the acquisition of a stock majority.
5. Different forms of merger, including the take-over of a company by another.
6. The new company, created by other companies.
7. The collaboration association *("agrupación de colaboración")* (Argentina), which involves internal collaboration among businesses.
8. The temporary union of companies *("unión transitoria de empresas")* (Argentina), which means the organization of joint ventures of a contractual nature among companies.
9. Consortia (Brazil, Uruguay), which involve joint contractual ventures.
10. Groups of companies, which can be in fact or at law, but which always indicate the presence of a unified control and management.
11. Personal relationship, which is a category included by Champaud and which refers to the influence on the business organization exerted by managers of an enterprise by virtue of their special personal relationships.
12. Holdings, which refers to companies organized for the sole purpose of holding shares of another.
13. Binational entities, which are associative structures admitted between Brazil and Argentina.
14. Binational enterprises, which are public entities organized for

the construction of hydroelectric power plants.

15. Export groups, which are stock corporations whose natural purpose in Argentina is to make exports of united small and medium companies.
16. Sectorial agreements, which are used by branches of the industry in the Mercosur (i.e., production of automobiles).
17. Trust ("*fideicomiso*"), which is a separate patrimony intended for a certain purpose and which may or may not be used for commercial purposes.
18. Cartels, which are price agreements among companies and which are prohibited by antitrust legislation.

The decentralization forms include:

1. Isolated act, which refers to an act carried out by a company in another country that neither generates permanency nor requires organization or registration.
2. Representative, either permanent or not permanent, which is a contractual device whereby a person or enterprise carries out business on behalf of another, a function accomplished through the agency agreement in some countries.
3. Branch, which is an arm of the same company having its seat in a different country.
4. Distribution agreements, which are contracts whereby the enterprise entrusts all or part of its activity to be carried out in another geographical place and examples of which are distribution, concession, and franchising.
5. Corporate break-ups (including spin-off, split-ups and split-offs), which occur when part of a company separates and forms another one.
6. Affiliate (Subsidiary), which exists when a company creates another that it legally controls or dominates.
7. Common affiliate, which exists when two companies form a third one.
8. Twin companies, which exist when the same group of persons creates a company on each side of the frontier in order to benefit from the economic advantages on both sides by acting as an importer from the country that is deemed more convenient in light of business conditions and examples of which in the Mercosur are breeding and sale of chickens.

C. *Business Organization*

In each Mercosur country, there is a group of structures created by domestic legislation that facilitate business organization. These struc-

tures may be selected by citizens or foreigners to create their own enterprise. The main forms of business enterprise are:

1. *Empresa individual or empresa personal*: "Individual enterprise or personal enterprise" (equivalent to individual proprietorship).
2. *Sociedad colectiva, sociedad de hecho, sociedad civil*: "Collective company, of facto company, civil company" (equivalent to general partnership).
3. *Sociedad de responsabilidad limitada ("S.R.L.")*: "Limited liability company" (a mix between corporation and general partnership).
4. *Sociedad anónima ("S.A.")*: "Stock company" (equivalent to corporation).
5. *Sociedad en comandita*: "Limited co-partnership company" (very similar to limited partnership).
6. *Sociedad del estado*: "State company" (public/private company). (government participating with private parties in commercial entities holding to majority or minority proportion of shares—such mixed entities cannot be declared bankrupt).

Collective, civil or de facto partnerships in the Mercosur countries are simple juridical organizations, mainly used by small or family enterprises, in which partners have unlimited liability. The de facto partnership (or irregular partnership) does not have a fixed term of duration and each partner can ask for the dissolution of the entity at any time.

The limited liability company (hereinafter referred to by its Spanish acronym "SRL") is a type of business entity that originated in England[15] and Germany.[16] Inspired by legislation originating in Austria,[17] France[18] and the Italy Project,[19] Argentina began incorporating this type of company in 1932. Brazil adopted this type of company in 1919, and Chile in 1923. SRL's partners have limited liability and their names are listed in the bylaws. This form of business organization has neither shares nor a board of directors. The status of partner is transferable to other partners or other people, subject to certain conditions and limitations. Meetings among partners and the management of the company are simple.

Stock companies *(Sociedad Anónima—"S.A.")*, which are similar to corporations, are the most important type of business organization and are ideal for medium and large size enterprises. The capital stock is rep-

15. *See* Companies Act, 1907, 7 Edw. 7, c. 50, § 37 (Eng.).
16. First applied to mining companies, before 1892.
17. In 1906. *See* ISAAC HALPERÍN, SOCIEDADES DE RESPONSABILIDAD LIMITADA 2 (1980).
18. In 1925. *See id.*
19. Developed after the Civil Code of 1942. *See id.*

resented by shares and it is mandatory to hold periodic shareholder meetings. The board of directors is the executive and administrative body; it is in charge of preparing the annual balance sheet, which is submitted at the periodic meetings.

There are few differences between these organizational forms in each country. In each of the countries, legal personality is acknowledged, allowing the companies to operate in neighboring countries without significant problems. Nevertheless, there is not as much flexibility as in the common law system because several important requisites for the distinction of each "form" of "company" are required.

D. Business Associations

As part of a program of professor exchanges among the Spanish Universities of Valladolid, León and Castilla-La Mancha, and those of Rosario and Buenos Aires,[20] a number of conferences were held during the years 1998 and 1999 in Valladolid, Buenos Aires, Toledo and Rosario on the status of and comparison among diverse institutions of the European Union and the Mercosur. The fruits yielded by these works, followed by hundreds of graduates, were remarkable: an enrichment of professors and students, diverse publications and a better knowledge among the academics of both nations. Although I lectured on a diversity of topics in my classes, in this work I wish to elaborate upon two ideas: one, related to the clarification of the theories that still remain in the associative legal structures, and, the other, related to the search of a simplified collaboration system among companies in South America and, especially, in the Mercosur.

The study of the association forms in each of the Mercosur member countries (full partners: Argentina, Brazil, Paraguay and Uruguay; associate members: Chile and Bolivia) permits harmonization of rules that allows companies not only to carry out their business in a simplified and free manner, but also with a significant legal certainty. We have accepted the challenge set forth by the Asunción Treaty[21] under article 1, last paragraph, which points out that the commitment of the Member States is "to harmonize their legislations in the pertinent fields to achieve

20. The School of Law of the University of Buenos Aires, which signed the agreement with the Spanish universities, organized the 1998 course and supported the visit of various professors to Spain in 1998 and 1999 through its Department of Economic and Entrepreneurial Law. It had the support of the Dean's Office and the Postgraduate Department, as well as the Institutional Relationships Secretariat. The university leading the program was Valladolid, comprised of a noteworthy group of commercial law professors, headed by Professor Luis Antonio Velasco San Pedro.

21. Treaty Establishing a Common Market, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041; *see also* Law No. 23.981, Sept. 4, 1991, D.O.U. Sept. 1991 (Braz.).

the invigoration of the integration process." In our task as researcher and director of the work of the FEIEI Foundation,[22] we try to develop the theoretical basis that we share with Boris Kozolchyk,[23] in the sense that an unflagging study of the juridical institutions is indispensable in order to understand better—and later harmonize—the systems of the countries in integration process.

Probably, the issue that most hinders entrepreneurs from focusing and concluding cross-border transactions are not the vicissitudes of the businesses themselves, but the difficulties, queries and uncertainties that both they and their lawyers will encounter in the legal systems of each country. These questions start with the issue of applicable law and the judge or arbitration court that will be competent to hear the case if a conflict arises. Without certainty regarding the legal framework, any process intended to reach the establishment of a domestic market is unfeasible, as shown in the development of the European Union in whose construction the legal framework has not been a minor issue.

Velasco San Pedro[24] has said that integration processes require a large dose of gradualism. This is immediately applicable, as the professor of Valladolid points out, to the Mercosur, which is still at the stage of construction of the domestic market, attenuated at times by a depressive cycle, but one that will be overcome. This gradualism will have advances and setbacks, areas of plateaus, rises and falls, until great distances can be reached, such as the "qualitative leap"—as Illescas Ortiz[25] termed it—achieved by the EU upon execution of Maastricht.

The first difficulty to overcome will be the choice between harmonization of associative law or the creation of a unified law for the Mercosur region. Miguel Araya[26] seems to say, when studying the right to freedom of establishment, that this should be attained through the drafting of a law of integration in the field of companies. The apparent forked path is not such, since the creation of the law in the Mercosur should be made through all the possible legal ways, including harmonization standards, rules of private international law, legal provisions of international trade and unified material law, and a recent

22. It is the Spanish acronym for the Foundation for International Studies and Research ("*Fundación para los Estudios e Investigación Interancionales*"), created in Buenos Aires, Argentina, by the author of this paper.

23. The talented North American professor left his professorship at the University of Arizona in order to found and direct the most famous research center in the world concerning the integration of North America, NAFTA and harmonization of institutions and instruments of international and regional trade. The center is called the National Law Center for Interamerican Free Trade and has its headquarters in Tucson, Arizona.

24. VELASCO SAN PEDRO, MERCOSUR Y LA UNIÓN EUROPEA: DOS MODELOS DE INTEGRACIÓN ECONÓMICA 172 (1998).

25. RAFAEL ILLESCAS ORTIZ, CECCHINI PAOLO & GARRIGUES WALKER ANTONIO, LA UNIÓN EUROPEA. EFICACIA Y DEMOCRACIA (1994).

26. PEDRO, *supra* note 24, at 143.

international trade and unified material law, and a recent acquisition of the juridical system of international businesses.[27]

The construction of the legal world regarding integration in South America must take into account the features of the integration process, not only of the Mercosur, but of the convergent, overlapped and even superimposed ones. Integration in this part of South America has been growing slowly because of existing patterns of the social fabric and the framework of political decisions. Many times those decisions are tinged with willingness, but essentially for *intus suceptionis*, although that internal dynamic legal structure is not known but by a few specialists.

The Mercosur features the following outstanding characteristics:

1. It has been created by acts of political will, with the leaders of Argentina and Brazil first, and later those of the four countries, feeling that this was the path to be followed in the region. That features has not changed, in spite of Argentine providing the Mercosur with some supranational rules.
2. The Common Market could not be achieved within the tight term fixed by the AT. Advances have been accomplished in the Free Trade Zone and in the Customs Union.
3. Both the FTZ as the Customs Union are not technically perfect and are incomplete.
4. It was made together with multiple social processes: return to democracy, opening of the economy, privatization of enterprises or systems of companies managed by the state, necessary capturing of investments, and dealing with both the burdens of the payment of a huge debt and the need to stop inflation.
5. It was born with legal provisions mainly of public law (institutional, customs organization, settlement of disputes, competition), and thereafter turned to business activity, to the law of business. This is why private law will be gradually incorporated in upcoming stages.[28]
6. It developed together or overlapping with other integration processes: bilateral treaties (example: Argentina-Mexico), the 1 + block treaties (examples: Chile with the Mercosur, Bolivia with the Mercosur, Brazil with the CAN), block-to-block treaties (example: EU-Mercosur treaty), and larger integrations (examples: ALCA, the integration of America).

27. *See* Etcheverry, *supra* note 13.

28. *See* Eugenio Xavier de Mello, *Aspectos Comerciales del Mercosur*, *in* EL MERCOSUR DESPUÉS DE OURO PRETO 98 (Facultad de Deerecho, Universidad de la República, República Oriental del Uruguay, Montevideo, UCUDAL eds., 1995).

7. It adds to the development of the international material law that is carried out through treaties of legislative unification, model laws or guides, generated by renowned international organizations such as Uncitral, Unidroit, and the International Chamber of Commerce.
8. In spite of its momentary stagnation in Seattle, the goals and the concrete activity of the WTO, that seeks the liberation of international trade and to which all the Mercosur member countries have followed, should not be forgotten.
9. It is a process that marks an about-turn in the confrontation policy prevailing in this part of the continent between Argentina and Brazil since South America's colonization.
10. It is a tendency framed within the natural development of the world order: the shift from the nation-state to the region-state in a world whose challenges are new; the end of poverty, unemployment, corruption, abuse by the powerful, wars, and diseases; the abatement of developing countries' foreign debt and globalization effects; the care of our planet; and the closing of rifts among countries (for example, those posed by computers and cybernetic world).

1. The Joint Venture

Temporary joint ventures are those domestic or international business organizations in which individuals or other forms of business enterprises participate to develop particular, specific and temporary goals. Joint ventures are temporary and there is no separate entity partnership among enterprises. The individuals or enterprises establishing the "consortia" or "transitory partnerships" are liable themselves. These forms of business must be registered and are dissolved upon the completion of their purpose or when stipulated in the contract. Argentina, Brazil and Uruguay have comprehensive laws that govern these organizations. In Paraguay, temporary joint ventures are not forbidden; they can be created under the form of "innominate contracts." Except as otherwise agreed, or in special cases, all debts and credits are attributed to the members of the group since these cannot be held as the property of a separate entity. In other words, joint ventures are not "companies."

2. Cooperation Agreements in the Mercosur

a. Brazil

Companies and corporations can form a consortium for certain un-

dertakings provided for under the same law. It does not have legal personality and is not a company. The obligations of the parties are governed by the contract, being each participating member separately liable for its obligations, and joint liability is not presumed. Bankruptcy of one of the consortium members does not extend to other ones, and the consortium continues among the other contracting parties. The debts of the bankrupt are paid in the form set forth in the consortium contract.

With respect to the consortium contract, it should be authorized by the competent body to alienate goods of permanent assets. The contract should contain (1) the name of the consortium, (2) the undertaking that constitutes its purpose, (3) its duration, address and forum, (4) the definition of the obligations and responsibilities of the consortium member companies and their specific contributions, (5) rules on allocation of profits and losses, (6) rules on management, representation and accounting, (7) deliberation forms, and (8) the contribution of each consortium party to the common losses, if any. The contract must be registered at the Registry of Commerce of the place of its seat and registration must be subsequently published.

b. Uruguay

Both natural and artificial persons may constitute a consortium, whose purpose is always temporary and may consist of a work, a service, or a supply. These consortia do not create an artificial person nor a company. Liability is individual; joint liability is not presumed. In the event of bankruptcy, death or inability of a member, the contract can be canceled and the remaining consortium member companies proceed. All changes to the contract require unanimity but all other decisions may be adopted by majority (unless otherwise agreed). One or more persons may manage the consortium and the rules governing business companies (especially collective partnerships) apply to management. The rules of mandate are applicable to the manager's liability and performance.

c. Argentina

Companies or individual merchants can constitute a temporary union of companies for the development or execution of a specific work, service or supply. The temporary union of companies is not vested with legal personality and is not a company. Foreign companies may execute this contract upon prior compliance of section 118, paragraph 3, of the Argentine business companies law. The contract must contain (1) the name of the consortium together with the expression "temporary union of companies," (2) its purpose, (3) its duration, which must be in accor-

dance with that of the work, service or supply, (4) the names of its members, (5) its domicile, established by choice for all purposes arising from the contract, (6) obligations of members, contributions of members to the common operating fund and financing of common activities, (7) the representative's name and address, (8) rules regarding participation in profits/losses and common expenditures, (9) conditions for the admission of a new member, exclusion of a member and dissolution, (10) penalties for breach of obligations, and (11) accounting provisions (these organizations must keep books according to the importance of the undertaking).

The organization must be registered with the Public Commercial Registry. The representative of the organization must have sufficient powers (from each of the members) to undertake the obligations and to exercise such rights as are related to the development of the work or service. Joint liability is not presumed. In the event of bankruptcy, death or incapacity of a member, the temporary union agreement continues among the remaining members, if they agree upon the manner of assuming pending obligations due. Decisions are adopted unanimously, unless otherwise agreed.

III. Conclusions: Possible Model for the Mercosur.

The collaboration among companies of the Mercosur should have positive legislation serving as a ground and support, while providing the business with legal certainty. For this reason, we believe that a common legislation is necessary, which can be created by means of a protocol already taking into account the legal system of Chile and Bolivia, so that these countries may easily adhere to the common rule.

The validity of an international contract is assured among the Mercosur Member Countries by the Protocol of Buenos Aires concerning applicable law and jurisdiction as regards contracts and which acknowledges full validity of the principle of autonomy of the parties' will. The Interamerican Convention that we have already mentioned, prepared by the CIDIP II, provides legal protection to the performance of business companies.

But the contractual joint venture in the Mercosur area does not have an express juridical regulation. Without intending to legislate in too much detail or in an oppressive manner, which would limit the possible businesses, rules are needed that, while being ample, may allow the performance of wide cooperation transactions among companies. Systems based on the de facto partnership, similar to the Argentinean, Chilean or Uruguayan models, pose a risk to joint venture agreements because these agreements do not prevent the severe penalties that these systems impose upon companies not regularly incorporated. The Brazilian consortium is

a device that should be modernized according to the new way of making business in a globalized economy.

A safe and modern legal system, in which a joint venture, not only a transitory one but also those with a certain degree of permanence, should be allowed and could be written in a simple protocol. This would fulfill the provision of "harmonizing legislation" provided for under the Asunción Treaty.

On the basis of the considerations set forth throughout this paper, we reach the following conclusions:

1. The Mercosur is an area of incomplete integration.
2. It is undergoing a stage of formation and development.
3. Work should be carried out to incorporate Chile and Bolivia.
4. In the meantime, business in the region, especially those involving collaboration among companies (contractual joint venture), should be facilitated.
5. The legislation in some Mercosur countries is incomplete or pose hindrances for the development of this type of business with full legal certainty.
6. It is necessary to create a regional rule (Protocol) establishing a free cooperation system among companies, and ensuring a simple and clear system that operates easily, functions usefully for companies of the region or other foreign companies, grants legal certainty, provides a flexible system, and embraces both temporary and permanent businesses.